Bosk Paint and Sandblast Co. *and* **Daniel Lynn McCorkle.** Case 9-CA-16885(E)

11 May 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 11 October 1983 Administrative Law Judge Robert W. Leiner issued the attached supplemental decision.[1] The Applicant filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

It is ordered that the application of the Applicant, Bosk Paint and Sandblast Co., Escanaba, Michigan, for an award under the Equal Access to Justice Act is dismissed.

[1] The Board's original Decision and Order herein is reported at 266 NLRB 1033 (1983).

SUPPLEMENTAL DECISION

EQUAL ACCESS TO JUSTICE ACT

ROBERT W. LEINER, Administrative Law Judge. On 1 July 1983 the National Labor Relations Board issued its Decision and Order (266 NLRB 1033) in the above-captioned proceeding adopting my recommended Order dismissing the 8(a)(1), (3), and (4) complaint in its entirety.

On 29 July 1983, Bosk Paint and Sandblast Co., herein called the Respondent or Applicant, filed with the Board in Washington, D.C., an Application for an Award of Fees and Expenses, pursuant to the Equal Access to Justice Act (EAJA), Pub. L. 96-481, 94 Stat. 2325 and Section 102.143, et seq. of the Board's Rules and Regulations. On 4 August 1983 the Board issued an order referring the matter to me for appropriate action. On 19 August 1983, the General Counsel filed a motion to dismiss the application pursuant to Section 102.150 of the Board's Rules and Regulations. On 1 September 1983 the Applicant filed a response to the General Counsel's motion to dismiss the application.

The gravamen of the motion to dismiss is that the General Counsel's position in the underlying unfair labor practice was "substantially justified" within the meaning of Section 102.144(a) of the Board's Rules and Regulations,[1] notwithstanding that Applicant may be "eligible" and prevailed in the proceeding. The Respondent's application and response assert as grounds to deny the General Counsel's motion to dismiss: (1) the General Counsel's motion to dismiss is "not appropriate" wherein it seeks to address the merits of the EAJA application rather than merely to address the threshold eligibility of Applicant to seek the award; and (2) in any case, the General Counsel has not established that his position was "substantially justified."[2]

The test of whether or not the General Counsel's action is "substantially justified" is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and in fact, no award will be made. This standard, however, should not be read to raise a presumption that the Government's position was not substantially justified simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. See H.R. Rep., No. 1418, 96th Cong., 2d. Sess. 10 (1980), reprinted in 5 U.S.C. Cong. and Ad. News 4984, 4989. *Enerhaul, Inc.*, 263 NLRB 890 (1982). Further, it is immaterial that the General Counsel, in supporting his substantial justification, may not have established a prima facie case of violation. *Enerhaul, Inc.*, supra. To be "substantially justified," however, the General Counsel must present evidence which, if credited by the factfinder, would constitute a prima facie case of unlawful conduct by the applicant. *S.M.E. Cement*, 267 NLRB 763 (1983).

At the hearing, it is true that I discredited the testimony of McCorkle (the alleged discriminatee) wherein he testified that he frequently applied for employment with the Applicant between 1978 and 1980 and his further testimony that he caused 50 to 60 work stoppages at the Applicant's Mead Corporation facility whereas he only caused two such work stoppages. Similarly, I discredited the testimony of the General Counsel's witness Simpson who stated that McCorkle applied for employment with the Respondent in the period 1978 to 1980. On the other hand, I found, in support of the General Counsel, that Respondent's hiring supervisor Chenier told Simpson, a Bosk employee, that the Applicant needed more painters and that Simpson then told Chenier that McCorkle and others were available for employment. Further, I credited Simpson's testimony that when Simpson mentioned this to Chenier, Chenier merely smiled and said nothing; but his foreman, Wayne Olsen, a statutory supervisor, said that there was "no way" that McCorkle would

[1] This section reads:

Sec. 102.144(a) *Standards for awards.* (a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may void an award by showing that its position in the proceeding was reasonable in law and fact.

[2] With regard to Applicant's first argument, the Board appears to have directly addressed the merits of an EAJA application on opposing *motion* notwithstanding that the General Counsel also sought dismissal on the ground of ineligibility, *S.M.E. Cement*, 267 NLRB 763 (1983).

work for Respondent; and that he was a "troublemaker." Thereafter, the Respondent hired three employees on the job but not McCorkle.

McCorkle had testified on behalf of employee Lansing in a prior Board proceeding. As a result of that proceeding, it was established that Applicant had unlawfully discharged Lansing in 1976 because of his protests against the Respondent's failure to abide by the terms of Applicant's collective-bargaining agreement with the Union. McCorkle was Lansing's chief witness in the Board's successful action against the Respondent.

I agree with the General Counsel's argument that the dispositive issue to resolve this EAJA application and whether the General Counsel was "substantially justified" is the question of the meaning of the use of the word "troublemaker" by Foreman Wayne Olsen in the presence of the hiring supervisor Chenier.

There is no question that the Board has ever encountered the use of the word "troublemaker" as a "code word" for persons who the employer believes are in engaged in "objectionable," i.e., union, activities. See, e.g., *L.D. Brinkman Southeast*, 261 NLRB 204, 209 (1982). On the basis of the General Counsel's information, McCorkle had called strikes to protest Applicant's administration of its union contract and was among the Respondent's chief antagonists as a witness in the prior Lansing unfair labor practice proceeding which cost the Respondent considerable backpay. The General Counsel was faced with the testimony, not of McCorkle, but of Simpson, to the effect that the Respondent's hiring supervisor refused to hire McCorkle when, at the time of the refusal, the hiring supervisor's foreman said that McCorkle would never work for the Respondent because he was a "troublemaker." In order for the Board to find a violation of the Act in the Applicant's refusal to hire McCorkle, the Respondent need not have used the words "union troublemaker" rather than mere "troublemaker." The ultimate questions whether the Respondent, in refusing to fire McCorkle, was motivated by his union activities (calling strikes) and his testimonial support of Lansing in a Board proceeding are matters of inference from all of the record facts.

It is true that the Respondent's successful examination and cross-examination of witnesses showed, to my satisfaction, that the word "troublemaker" referred to Foreman Wayne Olsen's personal animus against McCorkle rather than to McCorkle's union activities or his adverse Board testimony. Much of the evidentiary infrastructure to support this conclusion favorable to the Respondent could only have been developed in a full trial of the merits. Even if, as the Respondent argues in opposition to the General Counsel's motion, McCorkle showed himself at the hearing to be particularly incredible, and even if this should have been, in some degree, obvious to the General Counsel prior to issuance of complaint, the General Counsel would not have been remiss in deciding to litigate the matter: for it was not McCorkle's testimony that supplied the essential word "troublemaker," but the testimony of Simpson whom I credited in this regard, especially since Olsen did not appear at the hearing to deny or explain his use of the word "troublemaker" on cross-examination.

I conclude, from the presence of the above factors, that had not the Respondent successfully proved many matters of defense which were introduced only on cross-examination of McCorkle and thereafter on full examination of its own witnesses, the inferences flowing from the above factors in favor of the General Counsel would have supported a prima facie case of the Respondent's alleged violation of Section 8(a)(1), (3), and (4) of the Act. In such a posture, the General Counsel's case, being reasonable in law and fact, was "substantially justified" within the meaning of Section 102.144(a). *S.M.E. Cement*, supra, fn. 1; *Enerhaul, Inc.*, supra. Again, the fact that the General Counsel could reasonably believe that McCorkle exaggerated and was untruthful in some respects would not necessarily defeat the General Counsel's obligation to issue complaint to test the meaning of Olsen's use of the word "troublemaker" proof of which was supplied by an otherwise reliable witness (Simpson) in the Respondent's refusal to hire McCorkle. That the Respondent successfully showed that "troublemaker" did not mean "union troublemaker" does not defeat the General Counsel's motion to dismiss herein. Cf. *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983), *Parker Laboratories*, 267 NLRB 1174 fn. 2 (1983).

IT IS THEREFORE ORDERED that the General Counsel's motion to dismiss is granted and that the application for fees and expenses is dismissed.